No. 02-592

Supreme Court, U.S.
FILED
NOV 14 2002
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In The
Supreme Court of the United States

SYED M.A. HASAN,

Petitioner,

v.

UNITED STATES DEPARTMENT OF LABOR
and
WOLF CREEK NUCLEAR OPERATING CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

WOLF CREEK NUCLEAR OPERATING CORPORATION'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Where a complainant in an administrative proceeding, after discovery and an opportunity to submit evidence, fails to allege an essential element of a claim, is the Department of Labor precluded by the Supreme Court's decision in Swierkiewicz v. Sorema, 534 U.S. 506 (2002), from dismissing the matter without a hearing?

(2) Does the Energy Reorganization Act's authorization for dismissal by the Secretary of Labor of whistleblower complaints without investigation preclude the Secretary from dismissing such complaints after the completion of the investigative stage, where the complaint fails to allege a required element?

LIST OF THE PARTIES

Pursuant to Sup. Ct. R. 14(1)(b), Wolf Creek Nuclear Operating Corporation ("WCNOC"), concurs with the description of the petitioner and the respondent Department of Labor contained in the Petition. However, the petitioner erroneously states that WCNOC "is not a party to this proceeding."

To the contrary, WCNOC was the respondent in the proceedings before the Department of Labor and was granted leave to intervene in the proceedings before the United States Court of Appeals for the Tenth Circuit. As such, WCNOC was a party to the proceeding in the Tenth Circuit, and is also a party to this proceeding pursuant to Sup. Ct. R. 12.6.

CORPORATE DISCLOSURE STATEMENT

Wolf Creek Nuclear Operating Corporation ("WCNOC"), a Delaware corporation, is owned by three parent companies: Kansas Gas and Electric Company; Kansas City Power & Light Company; and Kansas Electric Power Cooperative, Inc. None of WCNOC's parent companies are publicly held.

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STATEMENT OF THE CASE

In November of 1999, Petitioner Syed M.A. Hasan ("Hasan") submitted his resume to Wolf Creek Nuclear Operating Corporation ("WCNOC"), along with a cover letter stating that he was applying for a civil/structural engineering position. See Complaint at 1. Hasan did not reference in the resume or accompanying cover letter any specific job opening at WCNOC for which he was qualified, nor did he indicate that he was submitting his resume in response to any solicitation or advertisement on the part of WCNOC. See Addendum to Complaint at Pages E through G.

On November 18, 1999, two weeks after submitting his application to WCNOC, Hasan filed a Complaint with the United States Department of Labor alleging that WCNOC failed to hire him as a structural engineer in violation of the employee protection provisions of the Energy Reorganization Act of 1974 ("ERA"), 42 U.S.C. § 5851 (1988 and Supp. IV 1992). Hasan contended that WCNOC's failure to hire him was in retaliation for protected whistleblowing activities engaged in while working for a former employer at another site. The Occupational Safety and Health Administration ("OSHA"), pursuant to statute, investigated and found that Hasan's Complaint could not be substantiated. OSHA's investigative report stated that, in the fall of 1999, WCNOC was not seeking applicants with Hasan's civil/structural engineering experience and that there was "no evidence that [his]

application for employment was denied because of previous ERA activities." (CL 1).[1]

Hasan requested a hearing pursuant to 29 C.F.R. § 24.4, and the case was referred to the Office of Administrative Law Judges on February 28, 2000. On March 14, 2000, WCNOC filed a motion to dismiss Hasan's Complaint on the ground that it did not allege facts sufficient to state a claim of refusal to hire under 42 U.S.C. § 5851. (CL 5). WCNOC also filed a motion for protective order seeking to preclude discovery until the Administrative Law Judge ("ALJ") ruled on the pending motion to dismiss. (CL 5). On April 3, 2000, the ALJ denied WCNOC's motion for protective order and required WCNOC to respond to Hasan's discovery requests. (CL 10). On April 20, 2000, pursuant to 29 C.F.R. § 24.6, the ALJ issued a Show Cause Order stating that the court had "not received any information from Complainant to substantiate [Hasan's] claim" and directing Hasan to "submit evidence or offer arguments" in support of his claim within thirty days after the receipt of WCNOC's discovery responses. (CL 11).

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[1] "CL" represents the Certified List of documents comprising the record in the administrative proceeding before the United States Department of Labor ("DOL"), which was prepared by the DOL and filed with the Tenth Circuit on July 3, 2001. The subsequent number refers to the number identifying the document on the Certified List. Because Hasan's November 18, 1999 Complaint, the exhibits in support of his Complaint, and the March 15, 2000 addendum to his Complaint were not identified on the Certified List, WCNOC filed a supplemental appendix with the Tenth Circuit containing those documents.

In compliance with the ALJ's Order, on April 25, 2000, WCNOC provided Hasan with comprehensive responses to his discovery requests. WCNOC's discovery responses included the resumes of all civil/structural engineers, including contractors, working for WCNOC during the relevant time period. The resumes produced to Hasan contained complete information regarding those employees' qualifications and professional experience. WCNOC also produced to Hasan the affidavits of three WCNOC employees, submitted to OSHA during the investigative process, which affirmed that, in November of 1999, WCNOC had no openings for a civil/structural engineer. Hasan did not challenge the sufficiency of WCNOC's discovery responses by filing a motion to compel with the ALJ.

On May 22, 2000, Hasan filed a response to the ALJ's Show Cause Order in support of the allegations in his Complaint. (CL 12). After WCNOC submitted its opposition to Hasan's response, Hasan filed another brief attempting to explain and bolster his allegations. (CL 14). The ALJ considered these post-discovery supplemental submissions, but nevertheless found that Hasan's complaint "failed to set forth a prima facie case of proscribed behavior or provide a full statement of the acts and omissions, with pertinent dates, which are believed to constitute a violation" in accordance with 29 C.F.R. § 24.5(a)(2). (Pet. App. A24). Consequently, the ALJ issued a recommended decision dismissing Hasan's Complaint.

Hasan sought review before the Department's Administrative Review Board ("ARB").[2] (CL 16). In its Final Decision and Order, the ARB concluded that Hasan failed to state a discriminatory failure to hire claim under 42 U.S.C. § 5851(b). (Pet. App. A15). In particular, the ARB found that Hasan's Complaint did not allege any adverse action on the part of WCNOC because it lacked any allegation that, following Hasan's rejection, WCNOC continued to seek applicants with similar professional qualifications to fill the purportedly open position. Because this allegation was lacking, Hasan's claim could not meet the elements required by the Secretary to proceed past the gate keeping provision, § 5851(b)(3).[3] As Hasan's Complaint did not satisfy the Secretary's longstanding test for stating a claim of refusal to hire, the ARB affirmed the ALJ's decision dismissing Hasan's Complaint. (Pet. App. A15).

On June 5, 2001, Hasan filed a petition seeking review of the ARB's decision by the United States Court of Appeals for the Tenth Circuit. Employing the framework set forth in the gate keeping provision, 42

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[2] The Administrative Review Board has been delegated the authority to act for the Secretary of Labor and issue final decisions on her behalf. 29 C.F.R. § 24.8(a).

[3] The Secretary's brief filed with the Tenth Circuit in this action confirms the Department's view that this statutory provision, combined with the implementing regulations set forth in 29 C.F.R. § 24.5, was correctly applied by the ALJ and ARB in this case to determine whether a complaint filed under the ERA fails to state a *prima facie* case and therefore warrants dismissal. See Brief for Secretary at 17 - 19.

U.S.C. § 5851(b)(3) - the same framework upon which the ARB based its decision - the Tenth Circuit affirmed the ARB's dismissal of Hasan's claim. Like the ARB, the Tenth Circuit determined that Hasan could not proceed past the gate keeping barrier of § 5851(b)(3) because he failed to allege the required element that WCNOC took some adverse action against him because of his prior whistleblowing activities. (Pet. App. A6).

Specifically, the Tenth Circuit ruled that Hasan's Complaint did not allege an adverse action of discriminatory refusal to hire for two reasons: (1) Hasan failed to allege that there was an open position at WCNOC for which he was qualified; and (2) Hasan failed to allege that WCNOC either filled that position or continued to search for applicants for that position after refusing to hire him. (Pet. App. A6). Further, the Tenth Circuit found that none of the additional discovery Hasan sought to conduct would have enabled him to allege these required elements. (Pet. App. A7). Accordingly, the Tenth Circuit ruled that the Secretary's actions were supported by substantial evidence and were not arbitrary or capricious. The Tenth Circuit therefore denied Hasan's petition for review of the Secretary's decision. (Pet. App. A7).[4]

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[4] The Tenth Circuit's decision was originally issued as an "Order and Judgment" pursuant to Tenth Circuit Rule 36.1. Rule 36.1 states that a case disposed of under this rule "does not require application of new points of law that would make the decision a valuable precedent." A motion to publish was granted by the court on July 26, 2002.

On June 5, 2002, Hasan filed a petition for rehearing or rehearing *en banc*. Hasan alleged that the Tenth Circuit committed reversible error by not considering this Court's holding in Swierkiewicz v. Sorema, 534 U.S. 506 (2002), which he argued precluded dismissal of his administrative complaint.[5] Hasan's petition for rehearing was denied without comment on July 16, 2002. (Pet. App. A25).[6]

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[5] The Tenth Circuit issued its Order and Judgment on April 26, 2002, after this Court's decision in Swierkiewicz. Not surprisingly, the Tenth Circuit did not address or refer to Swierkiewicz in its opinion, because, as discussed below, Swierkiewicz does not apply to administrative proceedings.

[6] A motion to publish the Tenth Circuit's decision was filed by a non-party and opposed by Hasan on the ground that the decision "rests on a very narrow holding." (Pet. Opp. to Non-Party Mot. for Publication at 4). Hasan also argued that, with respect to Swierkiewicz's application to administrative proceedings, the law in the circuit courts is "in flux" and "unsettled," referring to the pendency of petitions for rehearing filed on Hasan's behalf in "very similar proceedings" in the Seventh and Eleventh Circuits. Id. at 5, 7 - 8. Both petitions have since been denied. Hasan v. Dep't of Labor, 31 Fed. Appx. 328 (7th Cir.), reh'g denied, 2002 U.S. App. LEXIS 14654 (7th Cir. 2002) (affirming ARB's dismissal); Hasan v. Dep't of Labor, 35 Fed. Appx. 855 (11th Cir. 2002), reh'g denied, July 18, 2002 (same). No petitions for *certiorari* were filed.

REASONS FOR DENYING THE PETITION

I. The Application Of The Gate Keeping Provision Of 42 U.S.C. § 5851(b)(3) To The Proceeding Before The Administrative Law Judge Is Supported By The Statute, Comports With Longstanding Practice And Does Not Warrant Review By This Court.

A. The Gate Keeping Provision In § 5851(b)(3) Applies Beyond The Investigative Stage.

In 1992, Congress amended the ERA to include § 5851(b)(3), the "gate keeping" function which requires that complainants plead a *prima facie* case. Pub. L. No. 102-486, 106 Stat. 2776 (1992). This section contains provisions relating to both the investigative stage and the disposition of the complaint. 42 U.S.C. § 5851(b)(3). The Secretary has implemented regulations defining a *prima facie* showing under the ERA. 29 C.F.R. § 24.5(b) (2001).

Hasan claims that the gate keeping function of § 5851(b)(3) has only a single application and can only be used at the investigative stage. (Pet. 15). The 1992 amendments to the ERA were well described in Doyle v. Sec'y of Labor, 285 F.3d 243, 249 n.9 (3rd Cir. 2002): "[t]he amendment, aptly titled 'Avoidance of Frivolous Complaints,' also adopted a host of additional gate keeping functions (for example, the Secretary cannot even initiate an investigation until the complainant has established a prima facie case)." As explained in Doyle, § 5851(b)(3) does not apply simply to the one "example" of the Secretary's investigation, but also to

later stages of the proceeding, including the Secretary's "determination that a violation . . . has occurred." Id.; see also 42 U.S.C. § 5851(b)(3)(C).

The proceeding before the ALJ is a *de novo* "proceeding on the merits." 29 C.F.R. § 24.7(b). The OSHA decision becomes "inoperative" once a request for a hearing is filed. 29 C.F.R. § 24.4(d)(2). Nevertheless, a claimant who filed a frivolous claim, dismissed without investigation by OSHA under § 5851(b)(3)(A), could easily evade the Congressional purpose of the amendments by requesting a hearing, which, under Hasan's view, would be mandatory no matter how lacking in merit. This result would be completely contrary to the Congressional purpose and the Secretary's goal to enforce the statute to provide prompt relief for deserving claims.[7] See 29 C.F.R. § 24.7(a) & (c)(1) (requiring ALJ to issue decision in 20 days and providing interim relief).

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[7] This petitioner's litigation history aptly demonstrates one important reason for the gate keeping requirements – the speedy resolution of repetitive meritless claims. Hasan's extensive claim history is cited in the ARB's opinion in this case. (Pet. App. A15 n.2). Basically identical claims by this petitioner of other failures to hire have been dismissed by the ARB and those dismissals upheld by the Seventh and Eleventh Circuits. See Hasan v. Dep't of Labor, 31 Fed. Appx. 328 (7th Cir.), reh'g denied, 2002 U.S. App. LEXIS 14654 (7th Cir. 2002) (affirming ARB's dismissal); Hasan v. Dep't of Labor, 35 Fed. Appx. 855 (11th Cir. 2002), reh'g denied, July 18, 2002 (same).

B. The Department Of Labor Routinely Applies The Gate Keeping Function To Proceedings Before An Administrative Law Judge.

The requirement that the complainant plead a *prima facie* case is and has been routinely used throughout the administrative process both before and after the enactment of the 1992 amendments. See Hasan v. Dep't of Labor, 31 Fed. Appx. at 330 (affirming ARB's decision to dismiss claim based on failure to state a *prima facie* case); Hasan v. Dep't of Labor, 35 Fed. Appx. at 855 (affirming ARB's decision to dismiss claim based on failure to state a *prima facie* case); Saporito v. Fla. Power & Light Co., 94-ERA-35 at 6 (ARB July 19, 1996) aff'd, 192 F.3d 130 (11th Cir. 1999), reh'g denied, 210 F.3d 395 (11th Cir. 2000) (upholding ALJ's decision to dismiss claim because complainant failed to allege all elements of ERA claim); Varnadore v. Oak Ridge Nat'l Lab., 95-ERA-1 at 12 (ALJ Sept. 20, 1995) aff'd, 141 F.3d 625 (6th Cir), reh'g denied, 1998 U.S. App. LEXIS 13688 (6th Cir. 1998) (dismissing whistleblower claim based on failure to set forth or support with sufficient facts essential elements of the claim); Doyle v. Bartlett Nuclear Servs., 89-ERA-18 at 3 (Sec'y May 22, 1990) (dismissing complaint for failing to allege discriminatory conduct). The ARB has clearly stated that "[I]f a complaint fails to allege a *prima facie* case, the matter is subject to immediate dismissal." Hasan v. Commonwealth Edison Co., Nos. 01-222, 01-0033, 01-005 (ARB Apr. 23, 2001) (citing Lovermi v. Bell South Mobility, Inc., 962 F. Supp. 136 (S.D. Fla. 1997)).

In addition, two other circuit courts have reviewed decisions where the ALJ dismissed two other complaints by Hasan for failure to state a *prima facie* case and neither questioned the ability of an ALJ to grant a motion to dismiss based on failure to state a claim under § 5851(b)(3). See Hasan v. Dep't of Labor, 31 Fed. Appx. at 331 (affirming ARB's decision to dismiss claims based on failure to state a *prima facie* case); Hasan v. Dep't of Labor, 35 Fed. Appx. at 855 (affirming ARB's dismissal). Accordingly, the Tenth Circuit's decision is merely a routine application of a widely-used standard that does not present a novel or important question of law that warrants the attention of this Court.

Hasan cites Stone & Webster Eng'g Corp. v. Herman, 115 F.3d 1568 (11th Cir. 1997), for the proposition that § 5851(b)(3) only applies to the investigative stage. Neither the holding nor the reasoning of Stone & Webster, however, supports this argument. Stone & Webster concerns an ERA complainant who had a hearing on the merits before an ALJ. Id. at 1571. While Stone & Webster mentions that the gate keeping function must be overcome at the investigative stage, Id. at 1572, it does not discuss the application of this concept at the ALJ stage because no motion to dismiss was filed. See id. at 1571.

Hasan also cites the preamble to the implementing regulations, 63 Fed. Reg. 6614, 6615 (Feb. 9, 1998), as support for his assertion that the gate keeping function only applies at the investigative stage. However, the statement that the 1992 amendments are "a limitation on the investigative authority of the

Secretary of Labor" clearly refer to § 5851(b)(3)(A)&(B) which apply the gate keeping function to the investigative stage. This statement, however, does not preclude dismissal under § 5851(b)(3)(C)&(D). Hasan cites no other authority for his argument that § 5851(b)(3) applies exclusively to the investigative stage.

This case does not present a conflict in the circuit courts that requires resolution. Hasan cites Stone & Webster for the proposition that there is a circuit split. Hasan claims that there is a split in the circuits because the Tenth Circuit applied § 5851(b)(3) to an ALJ proceeding while the Eleventh Circuit discussed its application to the investigative stage in Stone & Webster. (Pet. 15 n.3). However, this does not create a conflict. Neither court held that § 5851(b)(3) applies exclusively to one stage of the proceeding or specifically stated that § 5851(b)(3) could not apply to another stage. Hasan cites no other case law in support of his claim that there is a circuit split requiring resolution by this Court.

It should be noted that Hasan raised the alleged misapplication of the gate keeping provision for the first time in his petition for rehearing to the Tenth Circuit. The Tenth Circuit did not grant the petition that included this argument. (Pet. App. A25). Neither the ALJ nor the ARB was asked to address the argument now before this Court. Notably, however, neither the ARB nor the Tenth Circuit raised any doubt about the ability of the ALJ to dismiss the Complaint based on failure to state a *prima facie* case in accordance with § 5851. (Pet. App. A5, A15).

C. The Tenth Circuit Decision Raises a Fact Specific Question.

Hasan claims that the Tenth Circuit's decision raises an important question of federal law because the decision "completely vitiates" the Congressional purpose of the ERA.[8] (Pet. 16). However, Congress' purpose in enacting the 1992 amendments to the ERA was to avoid and dispose of frivolous claims at an early stage. See Doyle v. Sec'y of Labor, 285 F.3d 243, 249 n.9 (3rd Cir. 2002). The Tenth Circuit decision simply carries out the purpose of the 1992 amendments by requiring Hasan to meet the statutory pleading standard for stating a claim under the ERA. As the Tenth Circuit correctly applied this Congressional mandate, the case turns on whether or not Hasan adequately pled his case. Thus, this case involves a fact specific inquiry - not an important question of federal law that requires review by this Court. See Sup. Ct. R. 10.

II. The Tenth Circuit's Ruling Does Not Implicate This Court's Decision in Swierkiewicz.

Hasan asserts that this Court should grant the writ because the Tenth Circuit's decision "conflicts with the pleading principles set forth by this Court . . . in Swierkiewicz v. Sorema, 534 U.S. 506, 122 S.Ct. 992 (2002)." (Pet. 11). Hasan's reliance on Swierkiewicz is

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[8] Interestingly, Hasan did not think the decision important enough to be published, as he opposed a motion to publish the Tenth Circuit's Order and Judgment. See Petitioner's Opposition to Non-Party Motion for Publication of Order and Judgment at 1.

misplaced. In Swierkiewicz this Court held that, under Title VII of the Civil Rights Act, a plaintiff does not have to plead specific facts in order to survive a Rule 12(b)(6) motion to dismiss because the Federal Rules of Civil Procedure require only "a short and plain statement of the claim showing that the pleader is entitled to relief." Swierkiewicz, 534 U.S. at 508 (quoting Fed. R. Civ. P. 8(a)(2)). The Swierkiewicz decision did not address and has no bearing on the appropriate pleading standard in an administrative action under the ERA.[9]

The instant action was brought to obtain relief under an administrative procedure implemented by the Department of Labor. The Federal Rules of Civil Procedure do not govern the pleading standard for a complaint under the ERA. Rather, 42 U.S.C. § 5851(b)(3) and 29 C.F.R. Part 24 address the appropriate pleading standard for complaints filed with the Department of Labor under the ERA. The Department's regulations governing these proceedings specifically state that the Federal Rules apply only in situations "not provided for or controlled by" the

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[9] Hasan argues that Swierkiewicz applies to actions under the ERA because the Department of Labor has adopted the Title VII framework. (Pet. 13 n.2). However, the use of Title VII concepts for defining the elements of a claim does not change an administrative proceeding into a civil action governed by the Federal Rules of Civil Procedure. Under Chevron, the Secretary should be given deference in her reasonable choice of a framework for adjudicating cases in an area where she has been delegated authority. See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

regulations. 29 C.F.R. § 18.1(a). The regulations provide the standards for complaints in ERA proceedings. Under 29 C.F.R. § 24.3(c), the complainant should include a "full statement of the acts and omissions, with pertinent dates, which are believed to constitute the violation."

Moreover, in Swierkiewicz, this Court mentioned that the notice pleading standard in Fed. R. Civ. P. 8 is "linked" to other provisions such as the motion for a more definite statement under Fed. R. Civ. P. 12(e). Swierkiewicz, 534 U.S. at 513-14. There is no analogous provision under the ERA or the applicable regulations to allow an employer to request a more definite statement. There is no provision for filing an answer in an ERA claim as there is in the Federal Rules. Fed. R. Civ. P. 7; 63 Fed. Reg. 6613, 6617 (Feb. 9, 1998). Proceedings under the ERA are more informal. Formal rules of evidence do not apply. 29 C.F.R. § 24.6(e)(1). These provisions have been put in place to expedite and simplify the administrative process where many complainants appear *pro se*. 63 Fed. Reg. 6613, 6619 (Feb. 9, 1998). Speed is important because the statute requires that the entire proceeding, from the filing of the complaint to a decision by the Secretary, take only 90 days. 42 U.S.C. § 5851(b)(2)(A). Accordingly, the notice pleading system used in the federal courts is not applicable to complaints filed pursuant to the ERA.

The holding in Swierkiewicz simply does not apply to an administrative proceeding such as this one. [10]

Hasan has cited no decisions suggesting the extension of Swierkiewicz to administrative proceedings. After Swierkiewicz was decided, Hasan presented the same arguments set forth in his petition to this Court to the Tenth, Seventh and Eleventh Circuits in Petitions for Rehearing. All have been denied. [11] Hasan v. Dep't of Labor, 2002 U.S. App. LEXIS 14654 (7th Cir. 2002). Hasan v. Dep't of Labor, 35 Fed. Appx. 855 (11th Cir. 2002), reh'g denied, July 18, 2002.; (Pet. App. A25); see also Baxter v. Rose, 305 F.3d 486, 490 (6th Cir. 2002) (stating that Swierkiewicz did not displace statutory pleading standard in Prison Litigation Reform Act).

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[10] Furthermore, even if the holding in Swierkiewicz changed the requirements for a *prima facie* case in an administrative action, the ALJ's decision dismissing the complaint would still be upheld. The ALJ based the dismissal on two grounds: (1) Hasan failed to set forth a *prima facie* case; and (2) Hasan "failed to . . . provide a full statement of the act and omissions with pertinent dates, which are believed to constitute a violation." (Pet. App. A24). As Hasan did not include a full statement as required by the regulations, his complaint was rightly dismissed in any event. Review by this Court of Hasan's questions presented would not change the ALJ's ruling on this second ground for dismissal.

[11] Hasan did not seek review by this Court of the decisions in the Seventh and Eleventh Circuits.

III. Because The Complainant Was Afforded Discovery In This Case, The Second Question Presented By The Petitioner Is Not Supported By The Record.

Hasan's petition mistakenly states that he was "afforded no discovery" prior to the dismissal of his Complaint. (Pet. 9). In fact, WCNOC moved for a protective order to stay discovery until the motion to dismiss was decided. (CL 5). In an Order dated April 3, 2000, the ALJ denied the motion for a protective order and directed WCNOC to respond to Hasan's discovery requests. (CL 10). The ALJ also deferred the date for Hasan's response to the ALJ's Order to Show Cause until "thirty (30) days after discovery is due or May 26, 2000" (CL 11).

WCNOC responded on April 25, 2000. WCNOC's discovery responses included: (1) information and documentation regarding recruiting and selection of WCNOC employees; (2) information regarding termination of employees for failing to comply with environmental protection or nuclear safety laws or regulations; (3) communications between WCNOC and Hasan; (4) all non-privileged documentation referring to Hasan; (5) documentation regarding contractual arrangements for hiring civil/structural/pipe support engineers during the relevant time period, with trade secret information redacted; and (6) information and documentation regarding the qualifications of civil/structural/pipe support engineers or contractors working for WCNOC during the relevant time period. In his two responses to the Show Cause Order, (CL 12 & 14), Hasan

complained about not receiving full discovery because WCNOC deleted names and personal data from resumes provided. Hasan never filed a Motion to Compel further answers, and as the Tenth Circuit noted (Pet. App. A6-7), the information withheld would not have helped meet the deficiencies in Hasan's case.[12]

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[12] Hasan's brief to the ARB complained that he had not been provided "ALL THE DISCOVERY DOCUMENTS (WITHOUT REDACTIONS)." (p. 8). His brief in the Tenth Circuit challenged the failure to provide him "complete and unredacted Discovery documents . . ." (p. 9). The ARB opinion specifically acknowledges that WCNOC had "participat[ed] in discovery." (Pet. App. A11). The Department of Labor's brief to the Tenth Circuit also emphasized that "[i]t is of critical importance that before Hasan was determined not to have set forth a prima facie case, he was permitted by the ALJ to conduct discovery." See Brief for the Secretary of Labor at 20. The Tenth Circuit's statement (Pet. App. A7) that the ARB affirmed dismissal "prior to discovery" is inaccurate.

CONCLUSION

For the reasons set forth above, Hasan's petition for writ of *certiorari* should be denied.

Dated: November 14, 2002

Respectfully submitted,

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